

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

75-1159

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P95

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1159

UNITED STATES OF AMERICA,

Appellee,

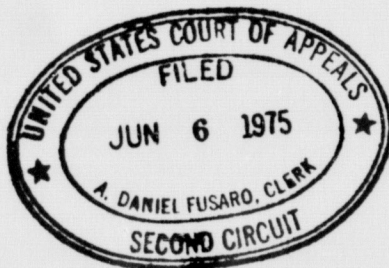
—vs.—

GANDOLFO ALBANESE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT



RICHARD I. ROSENKRANZ
Attorney for Defendant-Appellant
66 Court Street
Brooklyn, N.Y. 11201
TR 5 - 9440 - 1

DAVID G. TRAGER
*United States Attorney for the
Eastern District of New York*
United States Courthouse
Brooklyn, N.Y. 11201

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INDEX TO APPENDIX

	<u>PAGE</u>
DOCKET ENTRIES	1a-4a
SUPERSEDING INDICTMENT	5a-6a
MOTION FOR JUDGMENT OF ACQUITTAL	7a-15a
COURT'S CHARGE TO JURY AND VERDICT	16a-52a

74CR 814

JUDD

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.: WEINTRAUB
VS.	
JERRY BATTELORO	
STEPHEN GORONSKY	
X FRANK DU BOIS	
X GANDOLFO ALBANESE aka "Moe"	
NICHOLAS GREGORIS aka "El D", "Nick the Greek"	For Defendant:

Did conspire to distribute and did possess heroin

[illegible]

DATE	PROCEEDINGS
12/23/74	Before BARTELS, J.- Indictment filed and ordered sealed by the Court Bench warrant ordered. (Gregoris)
1-2-75	Before JUDD, J - case called - all defts present with counsel except for deft GREGORIS who is reported a fugitive - Indictment unsealed by the Court - all defts that were present arraigned and enter pleas of not guilty - bail set in previous indictments to cover this case - case adjd to 2-10-75 for trial.
1-29-75	Notice of Readiness for Trial filed
2/7/75	Before JUDD, J.- Case called- Deft and counsel present- Deft DuBois being advised of his rights by the court and on his own behalf waives his plea of not guilty and enters a plea of guilty to count 1- court factual basis for the plea- bail conditions contd- sentence adjd with

74CR 814

DATE	PROCEEDINGS
2-10-75	Before Judd, J - case called - adjd tp 3-3-75 at 11:00 A.M. for trial.
2/10/85	Affidavit of Ira London, esq. filed
2-13-75	Notice of Motion filed, to sever the deft Gandolfo Albanese for purposes of trial, pursuant to Rule 14, F.R.C.P. (ret. 2-21-75)
2/14/75	Before JUDD, J.- Case dalled- Deft ALBANESE and counsel present- Other de and counsel not present- Govt't motion to sever deft Albanese from trial on 3/3/75- motion argued- granted with condition that deft Albanese be tried immediately after trial of other defts- Case adjd to 3/3/75 at 10:00 A.M. for trial as to defts Battiloro, Goronsky and Gregaris
2/14/75	By JUDD, J.- Order filed that trial of deft Albanese is to follow those of above defts (order on back of motion papers)
/19/75	Before JUDD, J.- Case called= Deft ALBAMESE' counsel present- Deft's mot to dismiss on basis that special atty Weintraub was unauthorized to proceed before the Grand Jury- motion argued- motion denied
2-20-75	Bench Warrant Issued (Gregoris)
2/27/75	Stenographers Transcript datd 2/19/75 filed
3/3/75	Before JUDD, J.- Case called- Defts Battiloro & Goronsky present with counsel-Case adjd to 3/4/75 for disposition.
3/4/75	Before JUDD, J.- Case called- Marked ready and passed to 3/6/75 at 10:00 A for trial as to ALBANESE- Defts BATTILORO AND GORONSKY present with coun: defts after being advised of their rights by the court and on their own behalf withdraw their pleas of not guilty and enter pleas of guilty on count 1- Court finds factual basis for both pleas- deft BATTILORO sentence to custody of atty general for study and report pursuant to T-18, U.S.C. Sec. 4208(b)(c)- Execution of sentence stayed to 3/14/75- Court recommend: commitment at Danbury Conn.- deft GORONSKY sentenced to the custody of the atty general for study and report pursuant to T-18, U.S.C. Sec. 4208(b)(c) execution stayed to 3/14/75- court recommends commitment at Danbury Conn. pre-sentence reports to be prepared in normal course
3/4/75	Judgments and Commitments filed- certified copies to Marshal
3/4/75	Govt's request to charge filed
3-10-75	Before Judd, J - case called - deft Albanese & counsel Richard not present - Bench Warrant ordered - adjd to Mar. 11, 1975 for trial.
3-13-75	Before JUDD, J - case called - marked ready & passed (ALBANESE)
3/14/75	Certified copy copies of judgments and commitments ret'd and filed- defts delivered to Federal Detention Headquarters (GORONSKY and BATTILORO

74 CR 814

CRIMINAL DOCKET

DATE	PROCEEDINGS
3/18/75	Before JUDD, J.- Case called- Marked ready and passed to 3/19/75
3-19-75	Before JUDD, J - case called - deft ALBANESE & counsel Richard Rosenkranz present - Audibility hearing begun and concluded - Tapes found to be audible - trial ordered & BEGUN - Jurors selected and sworn - Govt opens - Deft Opens - Trial continued to Mar. 20, 1975 @ 10:00 A.M.
3-20-75	Before JUDD, J - case called - deft ALBANESE & counsel present - trial resumed - Juror #3 reported sick and replaced by Alt. #1 - defts motion to dismiss argued - motion denied - contd to 3-21-75
3/21/75	Before JUDD, J.- Case called- Deft ALBANESE and counsel present- Trial resumed-Deft rests-Deft renews motion to dismiss- motion denied- deft sums up- Govt sums up- Jury retires to deliberate- Jury returns and-render a verdict of guilty as to counts 1,2,3- Trial concluded- Jury discharge Bail contd- Case adjd to 4/4/75 at 9:30 A.M. for sentence
4-3-75	Before JUDD, J - case called & adjd to 4-10-75 for sentence of deft Frank Du Bois.
4/4/75	Before JUDD, J.- Case called- Deft and counsel present- Deft sentenced to imprisonment for a period of 9 years to run concurrent on counts 1,2 and 3 plus a special parole term of 6 years- Court recommends commitment at Lewisburg so that deft's aged parents don't have to travel to Atlanta to visit- Deft advised of his right to appeal- deft remanded
4/4/75	Judgment and Commitment filed- certified copies to Marshal (ALBANESE)
4/4/75	Notice of appeal filed (ALBANESE)
4/4/75	Docket entries and duplicate of notice of appeal mailed to c of a
4/7/75	Certified copy of Judgment and Commitment ret'd and filed- deft delivered to Federal Detention Headquarters (ALBANESE)
4-10-75	Before JUDD, J - case called & adjd to 4-24-75 for sentencing as to deft FRANK DU BOIS.
4-23-75	Record on Appeal certified and handed to J.Gil for delivery to the Court of Appeals (Albanese)
4-24-75	Acknowledgment received from the Court of Appeals for receipt of Record on Appeal and filed (Albanese)
4-24-75	Before JUDD, J - case called & adjd to May 1, 1975 at 11:00 am (sentencing of deft Du Bois)
5-1-75	Before JUDD, J - case called - deft DU BOIS & counsel S.Katz present - deft sentenced to imprisonment for 4 years - execution of sentence is suspended and the deft is placed on ^{unsupervised} probation for 4 years plus 3 year special parole term on count one . On motion of

[illegible]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

5a

-----X
UNITED STATES OF AMERICA

-v-

JERRY BATILORO
STEPHEN GORONSKY
FRANK DU BOIS
GANDOLFO ALBANESE, a/k/a "Moe"
NICHOLAS GREGORIS, a/k/a "El D", "Nick the Greek"

DEFENDANTS
-----X

SUPERSEDING INDICTMENT

21 U.S.C. §§ 841 (a) (1)
846
18 U.S.C. § 2

74 CR 814

THE GRAND JURY CHARGES:

COUNT ONE

On or about and between the 24th day of April, 1974, and the date of this indictment, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants Jerry Battiloro, Stephen Goronsky, Gandolfo Albanese, a/k/a "Moe", Nicholas Gregoris, a/k/a "El D" and "Nick the Greek" and Frank Du Bois knowingly, intentionally, and unlawfully did conspire with each other to distribute and to possess with intent to distribute quantities of heroin, a Schedule I narcotic drug, in violation of Title 21, United States Code, Section 841 (a) (1).

[Title 21, United States Code, Section 846]

COUNT TWO

On or about the 29th day of April, 1974, within the Eastern District of New York, the defendants Jerry Battiloro, Stephen Goronsky, Gandolfo Albanese, a/k/a "Moe" and Frank Du Bois knowingly, intentionally, and unlawfully did distribute approximately 106.9 grams of heroin, a Schedule I narcotic drug controlled substance.

[Title 21, United States Code, Section 841 (a) (1); Title 18, United States Code, Section 2]

COUNT THREE

On or about the 8th day of May, 1974, within the Eastern District of New York, the defendants Jerry Battiloro, Stephen Coronsky, Gandolfo Albanese, a/k/a "Moe", and Frank Du Bois knowingly, intentionally, and unlawfully did distribute approximately 223 grams of heroin, a Schedule I narcotic drug controlled substance.

[Title 21, United States Code, Section 841 (a) (1); Title 18, United States Code, Section 2]

A TRUE BILL

FOREMAN

DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

MOTION FOR JUDGMENT OF ACQUITTAL, ETC.

7a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA,

-against-

NOTICE OF APPEAL

74 CR 814

GONDOLFO ALBANESE,

Defendant.

-----X

Name of Appellant: GONDOLFO ALBANESE

Name and Address of Attorney: RICHARD I. ROSENKRANZ
66 Court Street
Brooklyn, N.Y. 11201
Tel: 212-875-9440

Offense: Count 1: Violation of Title 21, U.S.C.,
Section 846; Count 2 and 3: Violation of Title 21,
U.S.C., Section 841(a)(1); Title 18 U.S.C. Section 2.

CONCISE STATEMENT OF JUDGMENT GIVING DATE & OFFENSE:

Guilty on Count 1, March 21, 1975, violation of
Title 21, U.S.C., Section 846. The defendant did
conspire to commit an offense against the United
States Government.

Guilty on Count 2, March 21, 1975, violation of
Title 21, U.S.C., Section 841(a)(1), violation of
Title 21, U.S.C., Section 2, the defendant did
knowingly and intentionally distribute approxi-
mately 106.9 grams of heroine.

Guilty on Count 3, March 21, 1975, violation of
Title 21, U.S.C., Section 841(a)(1), violation of
Title 18 U.S.C., Section 2, the defendant did
knowingly and intentionally distribute approxi-
mately 223 grams of heroin.

Sentenced to 9 years on Count 1, sentenced to 9
years on Count 2 and sentenced to 9 years on Count 3

MOTION FOR JUDGMENT OF ACQUITTAL, ETC.

on April 4, 1975, imprisonment on each Count to be served concurrently and an additional six years Special Parole Term upon release from custody.

Gondolfo Albanese, the above named appellant, hereby appeals to the United States Court of Appeals for the Second Circuit from the above stated judgments.

Dated: April 4, 1975
Brooklyn, New York

1 Don't talk about the case amongst yourselves
2 or anyone. Don't talk to anyone in the courtroom.
3 Don't make up your mind and you haven't heard the
4 whole thing or the summations. Thank you.

5 (The jury leaves the courtroom.)

6 THE COURT: Mr. Rosenkrantz?

7 MR. ROSENKRANTZ: At this time at the close
8 of the Government's case, the defendant Albanese
9 specifically moves for judgment of acquittal on the
10 ground the Government has failed to make out a prima
11 facie case.

12 I would especially address myself to the two
13 substantive counts where it is alleged Mr. Albanese
14 took part in direct sales, and there is no evidence
15 that -- even assuming, as we must at this time--
16 that the Government witnesses are telling the truth,
17 even if we credit Mr. DuBois with that, there's no
18 proof what he says he received from Mr. Albanese
19 was the same narcotics that the agents testified
20 they received from the defendants Battiloro and
21 Goronsky.

22 THE COURT: I think the objection you made
23 at side bar is more pertinent with respect to the
24 substantive counts than it is with the conspiracy
25 count. Let me hear what Mr. Weintraub says on that.

1 MR. WEINTRAUB: First of all, your Honor,
2 the sequence of events, I think, leads to a fair
3 inference that the same narcotics are involved.
4 In fact, on one particular occasion, as Agent Lieneck
5 testified, he observed the actual transfer from the
6 trunk of Mr. DuBois' car to Mr. Battiloro, and that
7 meshes with Mr. DuBois' testimony that he received
8 the narcotics the same day that he gave it to
9 Mr. Battiloro, and had it in the trunk of his car
10 and both testimonies show it was immediately before
11 the second transfer of a quarter of a kilogram of
12 heroin.

13 Even without that direct observation, the
14 time sequence would certainly permit a fair infer-
15 ence it was the same narcotics involved.

16 Not only that, but Mr. Albanese's admissions
17 on the tape very strongly indicate he was aware
18 that he was dealing with Mr. Battiloro and Mr.
19 Goronsky.

20 THE COURT: They certainly, I think, support
21 the conspiracy charge.

22 Do they support the two substantive charges?

23 MR. ROSENKRANTZ: Your Honor, Mr. Goronsky
24 and Mr. Battiloro could have had other customers,
25 other suppliers. There's no proof directly linking,

1 as it must, between Mr. Albanese and the Government
2 agent.

3 THE COURT: There's no proof that conclusively
4 links them, but isn't there circumstantial proof?

5 MR. ROSENKRANTZ: I don't think sufficient
6 for the substantive counts. I would tend to agree
7 that there might be enough--well, there doesn't
8 have to be any actual narcotics for the conspiracy
9 count, but I think for the substantive counts,
10 I do not agree there is sufficient.

11 THE COURT: Mr. Weintraub, Count 2 is a sale
12 of a little less than an eighth on April 29, and
13 Count 3 is a little less than a quarter on May 8th.
14 Was May 8th the one when they were arrested?

15 MR. WEINTRAUB: No, sir, May 15th. That
16 transfer took place in Manhattan.

17 THE COURT: That was the third one.

18 MR. WEINTRAUB: The indictment, I understand,
19 was not brought because of the jurisdictional problem
20 with that.

21 THE COURT: Which is the one where you say
22 Mr. DuBois observed the transfer?

23 MR. ROSENKRANTZ: Which transfer, your Honor?

24 MR. WEINTRAUB: The second transfer.

25 THE COURT: Where he observed Mr. Battiloro
take the package out of his car.

1 MR. WEINTRAUB: Alleged in Count 3.

2 MR. ROSENKRANTZ: Your Honor, even on that
3 count, we don't have any proof that what he saw
4 Battiloro take out of his trunk is the same nar-
5 cotics that was alleged to have been given to the
6 agents. There's no proof of that. There again is
7 the missing link.

8 MR. WEINTRAUB: Your Honor, Mr. Rosenkrantz
9 would place the judicial process in a straitjacket.
10 How are we to know that narcotics is not the same
11 unless we have a government agent and/or informant
12 with the narcotics every minute of the time that
13 it is being transferred, moved or in any way handled
14 during the transaction?

15 THE COURT: There are cases where they are
16 arrested at the time the money passes.

17 MR. WEINTRAUB: That would be quite a
18 restriction to place on the Government, the People
19 of the United States.

20 MR. ROSENKRANTZ: Especially where we have
21 Mr. DuBois testifying he never looked inside any
22 of the packages. He has testified to that.

23 MR. WEINTRAUB: He didn't--

24 MR. ROSENKRANTZ: Yes, he did. He testified
25 under my cross-examination that he never looked

1 inside the packages that he allegedly took
2 from Mr. Albanese or that he later gave back to
3 Mr. Albanese.

4 THE COURT: I think the tapes imply
5 Mr. Albanese was satisfied that they were the same
6 packages.

7 MR. ROSENKRANTZ: We still don't know if
8 that's what got to the agents.

9 THE COURT: The Court of Appeals has said
10 circumstantial evidence doesn't have to point to
11 the result of the exclusion of every possible
12 inference. This is a jury question. If you wind
13 up with some cases that show that it's a problem
14 of law, I'll reconsider it at the end of the case,
15 but I think it's a question of fact, Mr. Rosenkrantz.

16 MR. ROSENKRANTZ: I can understand the ques-
17 tion of fact as to conspiracy, but as to the pos-
18 session, either you have possession of a particular
19 property or you don't. Here there is no evidence
20 that what the agents have testified to and what was
21 put into evidence subject to connection have been
22 directly connected with Mr. Albanese. In other
23 words, there's no testimony that that narcotics
24 is what was allegedly received from him.

25 MR. WEINTRAUB: There's circumstantial proof

1 it's the same matter; they were dealing in large
2 quantities of money, dealing in narcotics, and it
3 would be an awful coincidence to assume that three
4 transactions on two sides of Mr. DuBois paralleled
5 each other without the connection that Mr. DuBois
6 has testified to.

7 THE COURT: It is a question of the weight
8 of circumstantial evidence.

9 MR. ROSENKRANTZ: Mr. DuBois testified there
10 was another supplier involved with these people.

11 MR. WEINTRAUB: In cocaine. We're not deal-
12 ing with cocaine.

13 MR. ROSENKRANTZ: I don't think he limited
14 it to cocaine.

15 MR. WEINTRAUB: He certainly did. You asked
16 him about a supplier in Florida. He said cocaine.

17 THE COURT: Vinnie said he's his customer.
18 Vinnie, I gather, is in the heroin business.
19 I think it's up to the jury whether that creates
20 a reasonable doubt as to whether this particular
21 piece of heroin came from Mr. Albanese. I'll
22 deny the motion.

23 MR. ROSENKRANTZ: That's on May 8th.

24 THE COURT: I think the same thing applies
25 to both.

1 MR. ROSENKRANTZ: Judge, on the other
2 there's no evidence at all.

3 THE COURT: On the other, you may not have
4 Mr. Battiloro watching it taken out, but Mr.
5 Battiloro--

6 MR. ROSENKRANTZ: You mean Mr. DuBois.

7 THE COURT: Mr. DuBois. Mr. DuBois said
8 he gave it to Battiloro and the agent got heroin
9 from Battiloro a short time later.

10 MR. ROSENKRANTZ: In order to connect
11 Mr. Albanese, we have to assume the only narcotics
12 being delivered from Battiloro to the agents was
13 that which he received from DuBois, and the evidence
14 is contrary to that.

15 I don't think the jury can be asked to specu-
16 late, which is indeed what they're going to do,
17 that this is the only material that they received
18 and they dealt in.

19 THE COURT: There's no evidence that they
20 received heroin from anyone else. There is a state-
21 ment of Vinnie, said they were his customers, but
22 not at what time.

23 MR. WEINTRAUB: Mr. DuBois' statement he
24 originally introduced them to Vinnie, but that that
25 didn't work out, and he then went and made a con-
tact with Mr. Albanese, which may well lead,

1 I think it shows why Vinnie perhaps felt they should
2 have been his customers.

3 THE COURT: I think it's an issue of fact.

4 MR. ROSENKRANTZ: I would also move for dis-
5 missal on all three counts, on the ground there has
6 been no evidence that the defendant Albanese was
7 aware that this material was going to be dealt in
8 Brooklyn, the narcotics were going to be dealt in
9 Brooklyn.

10 THE COURT: That doesn't matter.

11 MR. ROSENKRANTZ: Well, I thought I'd raise
12 it anyway.

13 THE COURT: No, conspiracy can be prosecuted
14 wherever any overt act takes place.

15 I'll see you all in the morning.

16 No further requests?

17 MR. ROSENKRANTZ: Only as to character.

18 THE COURT: Only character.

19 MR. ROSENKRANTZ: Thank you, your Honor.

20 MR. WEINTRAUB: Thank you.

21 (Time noted: 3:20 p.m.)

22 ---
23
24
25

Time noted: 2:15 p.m.

THE COURT: We are ready to proceed. Bring in the jury, please.

(The jury enters the jury box.)

THE COURT: Mr. Weintraub, Mr. Rosenkrantz, Mr. Albanese, Miss Tripp, and Ladies and Gentlemen of the Jury:

We have come now to the part you have heard about all along, about the instructions on the law. You have heard the arguments of counsel, and you're going to determine the facts with that in mind. When I give you the law, you have to follow the law as I give it. I follow, to some extent, written papers, to be sure I'm as accurate as may be.

What I do is first describe the general principles that apply to all criminal trials, then the nature of the charge in this case and the specific rules of law that apply to those charges, some suggestions about how you should evaluate, weigh the evidence that you have heard, and a few comments on the evidence, and finally something about how to reach a verdict.

It's the duty of the parties, various ways, the prosecutor's duty in our adversary system of

Charge of the Court

justice to do his best to prove the Government's case. The defense counsel's duty is to represent his own client's interest. It is my duty to enforce the rules of evidence and state what the law is, and it is your duty to decide the facts, which includes deciding the truth or falsity of the testimony.

You're to follow my instructions on the law, but you're the sole judges of the facts. You're to perform your duties without bias or prejudice for or against any party. The law doesn't permit jurors to be governed by sympathy, prejudice or public opinion.

The law presumes the defendant is innocent of crime. So the law permits nothing but legal evidence presented before the jury to upset that presumption and to be considered in support of a charge against the accused.

The presumption of innocence is enough in itself to acquit a defendant unless the jurors are satisfied beyond a reasonable doubt of his guilt on a particular count from all the evidence in the case.

I'm going to say a few words about what the law means by a reasonable doubt. The words are

Charge of the Court

fairly simple. A reasonable doubt is a fair doubt based on reason and common sense arising from the state of the evidence or absence of the evidence. A reasonable doubt doesn't mean a doubt that a juror asserts arbitrarily in order to avoid performing an unpleasant task. It doesn't mean beyond all possible doubt, because it is very rarely possible to prove anything to an absolute certainty.

One of the tests that is used in this area for proof beyond a reasonable doubt is that it refers to the sort of doubt that would make you hesitate to act in your own important affairs, this being an important affair for both parties.

This rule of proof beyond a reasonable doubt operates on the whole case. It doesn't mean that each bit of evidence must be proved beyond a reasonable doubt, but it means the sum total of the Government's evidence less any cross-examination or defendant's evidence must satisfy you beyond a reasonable doubt as to each element of the crime charged or else you must acquit.

Finding a person to be guilty of a felony and subjecting him to criminal penalties is serious, and you have a right to consider this fact in

Charge of the Court

deciding whether you have a reasonable doubt, but if you are convinced beyond a reasonable doubt of the defendant's guilt, then you must find him guilty and not be swayed by sympathy.

An indictment, as you have heard before, is not evidence of any kind against the accused. It is just a formal method of accusing the defendant of a crime. The defendant has pleaded not guilty. The indictment and the plea create the issues which you must decide.

The law never imposes a duty on a defendant in a criminal case to produce any evidence or to testify. The fact that the defendant did not testify does not create any inference with respect to the truth of the testimony against him or with respect to his guilt, and you must not talk about it when you're in the jury room. That's not a fact.

I'm going to read the indictment for you so you know exactly what you're passing on. It has three counts, two of conspiracy and one that we call substantive, which is the actual passing of heroin.

Count 1 charges that "On or about and between the 24th day of April, 1974, and the date of this indictment," which was December 23, 1974,

Charge of the Court

both dates being approximate and inclusive, within the Eastern District of New York," which is all of Long Island and Staten Island, "and elsewhere, the defendants Jerry Battiloro, Stephen Goronsky, Gandolfo Albanese, also known as 'Moe,' Nicholas Gregoris, also known as 'El D' and 'Nick the Greek,' and Frank DuBois, knowingly, intentionally, and unlawfully did conspire with each other to distribute and to possess with intent to distribute quantities of heroin, a Schedule I narcotic drug, in violation of Title 21, United States Code, Section 841(a)(1)." This count also refers to Title 21, Section 846.

Count 2 charges, "On or about the 29th day of April, 1974, within the Eastern District of New York, the defendants Jerry Battiloro, Stephen Goronsky, Gandolfo Albanese, and Frank DuBois knowingly, intentionally, and unlawfully did distribute approximately 106.9 grams of heroin, a Schedule I narcotic drug controlled substance." There is a reference to Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2, which I will mention in a few minutes.

Count 3 charges, "On or about the 8th day

Charge of the Court

of May, 1974, within the Eastern District of New York, the defendants Jerry Battiloro, Stephen Goronsky, Gandolfo Albanese, and Frank DuBois, knowingly, intentionally, and unlawfully did distribute approximately 223 grams of heroin, a Schedule I narcotic drug controlled substance." It refers to the same section.

It's not required that the dates and amounts be exactly accurate as long as they are approximate and sufficient so that the indictment has given notice to the defendant of the fact of which he is charged. If you will notice, the amounts in the two substantive counts are a little bit less than an eighth and the other a little less than a quarter of a kilogram. That difference is not significant here.

In connection with the law, I'll mention first Section 841(a)(1) of Title 21, which is part of the drug abuse prevention and control act. This section provides that except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled

Charge of the Court

substance, "controlled substance," is defined in another section of the Code -- and heroin is specifically listed as one of the opium derivatives which is a controlled substance under Schedule I of that section.

"Distribute" is defined in another section of the same section, 812, Title 21, as meaning simply to deliver. "Distribute" doesn't mean passing it out to a lot of people on the street. The turning over of a package of heroin from one person to another is a delivery and therefore is a distribution.

I won't review the range of penalties because these are for a judge to determine if there is a finding of guilty.

The statute requires that the distribution or possession be knowingly or intentionally. An act is done knowingly if it is done voluntarily and not because of mistake or accident or other innocent reason. A transaction is not intentional unless it's knowing. So the two words pretty much are synonymous. They fit together.

The first count refers also to Section 846, which is the conspiracy count. That reads: "Any

Charge of the Court

person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both, which may not exceed the maximum punishment prescribed for the offense the commission of which was the object of the attempt or conspiracy."

With reference to the first count, then, the essential elements necessary to establish the offense of conspiracy can be divided into four:

First, there was an agreement between two or more people;

Second, the defendant willfully became a member of the conspiracy;

Third, one of the conspirators took some step to accomplish the purpose of the conspiracy;

Fourth, that that step was knowingly done in furtherance of some purpose of the conspiracy, which here is said to be the distribution and possession with intent to distribute, of heroin.

The burden is always upon the prosecution to prove every essential element of the crime charged beyond a reasonable doubt. The person can become a member of the conspiracy without knowing all the details of the conspiracy. When you determine

Charge of the Court

1 whether a conspiracy existed, you can consider the
2 acts and statements of all the alleged members, but
3 in determining whether Mr. Albanese was a member
4 of the conspiracy, you can consider only his own
5 acts and statements. He can't be bound by the acts
6 or statements of other participants until it is
7 established that there was a conspiracy and that
8 he was one of its members.
9

10 When it does appear beyond a reasonable
11 doubt that a conspiracy existed and the defendant
12 was a member, then statements knowingly made and
13 acts knowingly done by any member of the conspiracy
14 may be considered as to the defendant who is found
15 to be a member even though they may have occurred
16 in his absence and without his knowledge, provided
17 they were knowingly made or done during the existence
18 of the conspiracy by a member of the conspiracy and
19 in furtherance of some object or purpose of the
20 conspiracy.

21 A conspiracy requires at least two members,
22 but it is not necessary that more than one be on
23 trial at a time. You're concerned only with
24 Mr. Albanese's guilt. You shouldn't speculate
25 as to what happened to Mr. Battiloro or Mr. Goronsky

Charge of the Court

or why they're not on trial at this time. In fact, if only Mr. DuBois and Mr. Albanese were involved in the conspiracy, that's enough to satisfy the requirements of the statute.

In connection with Counts 2 and 3, the indictment refers also to Section 2 of Title 18 of the United States Code. This says, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal." That means that somebody who helps another person commit a crime is just as guilty as if he did it himself.

With respect to the substantive counts, Title 341 counts, the sale counts, there are just two essential elements of the crime: first, the act of distributing heroin as alleged, and second, knowingly or intentionally.

In reference to each of these counts, the burden is on the Government to prove each of the essential elements beyond a reasonable doubt. The burden rests with the Government all through the trial. It never shifts to the defendant. If you have a reasonable doubt as to any element on any

Charge of the Court

count, you must acquit on that count just as you have a duty to convict if you're persuaded beyond a reasonable doubt of all the elements of the crime.

Now I come to some of the rules on evaluating evidence.

Generally speaking, there are two types of evidence from which a jury can proceed to find the truth of the facts in a case. One is direct evidence, the testimony of an eyewitness. The other is indirect or so-called circumstantial evidence, that proof of a chain of circumstances that logically point to the existence or nonexistence of certain facts.

Here we have direct testimony by Mr. DuBois that the defendant provided him with heroin. We have circumstantial evidence on the authenticity of the tapes, for instance, Mr. DuBois and Mr. Albanese were seen together just before and just after the conversation that is said to be recorded on the tapes.

The defendant points to circumstantial evidence that maybe the tapes aren't authentic because there was a gap between the time when Mr. DuBois left Billy's bar and the time when

Charge of the Court

the agents caught up with him and found where he was and said they took the tape off him.

Generally, the law makes no distinction between direct and circumstantial evidence. Circumstantial evidence to establish guilt doesn't need to exclude every reasonable hypothesis of innocence. It's only necessary that a jury be satisfied of a defendant's guilt beyond a reasonable doubt on the basis of all the evidence in the case, both direct and circumstantial.

Circumstantial evidence alone can be enough to convict if you find the defendant guilty beyond a reasonable doubt on the whole case.

Now with respect to the scope of what you can consider: When you analyze evidence you can draw reasonable inferences based on your own common sense and your general experience, but only from facts that you find were proved. You can't speculate as to things for which there is no evidence, but you're not confined to the bare bones of the testimony.

Credibility is a problem here, and that's one of the difficult aspects of your duty. It's the theory of American justice that twelve citizens

Charge of the Court

selected as a cross-section of the community and screened to eliminate any preconceptions can best determine the truth of a charge.

When you weigh the testimony of the various witnesses, you use some of the same types of judgment you do when people are trying to persuade you to do anything in your life. Here you consider the relationship of the witnesses to the Government, to the defendant, their bias or interest in the outcome of the case, their manner while then testifying, their candor, their intelligence, as you have observed them.

You can consider and you should consider the extent to which any evidence has been corroborated or contradicted by other credible testimony. Give thought to inconsistencies within the testimony of any witness, either on direct examination or cross-examination, and whether any witness has changed his testimony.

There is a rule, falsus in uno, falsus in omnibus. If a witness lied, you can say you won't believe anything the witness testified. You can also say part of what the witness said on the witness stand may still be true.

Charge of the Court

The same with inadvertent inconsistencies. They may lead you to disregard a witness's testimony in whole or in part, but a witness may have been mistaken or untruthful with respect to part of his or her testimony and be correct and truthful with respect to other parts. For instance, if Mr. DuBois was truthful about having been a professional jewel thief for fifteen years, which goes back before his 1962 conviction, you can determine whether that's true or whether other things that he said are true or not true. It's for you to decide in each case.

One thing more on this: Where you find there is an inconsistency or change in testimony, you should consider whether involves a detailed or important part of the testimony. You can consider in your own experience where you have heard repetitions of the same story by the same person or by different persons, whether they're exactly the same each time they are told or when each person tells them and whether variations of that sort indicate falsehood or inaccurate memory or have some other explanation.

We had some Government agents testify in

Charge of the Court

1
2 this case. As a rule, with respect to them you're
3 not to give any greater weight or credibility to
4 the testimony of a witness solely because of the
5 fact he's a Government agent. You don't give any
6 less credit on that account. The testimony of a
7 Government agent should be evaluated in the same
8 manner as you would evaluate the testimony of any
9 other witness.

10 There is another special rule about what's
11 called accomplice testimony. Mr. DuBois was an
12 accomplice of Mr. Albonese according to the Govern-
13 ment's view of the case. An accomplice is somebody
14 who joins with another person in the commission of
15 a crime, voluntarily and with common intent. An
16 accomplice is not incompetent as a witness because
17 of his participation in the crime. On the contrary,
18 the testimony of an accomplice alone, if you believe
19 it, may be of sufficient weight to sustain a ver-
20 dict of guilty even though it's not corroborated
21 or supported by other evidence; but you should keep
22 in mind this rule, that the testimony of accomplices
23 should always be received with caution and weighed
24 with care.

25 You can also consider the fact that

Charge of the Court

Mr. DuBois in giving testimony against Mr. Albanese may have hoped for some leniency in punishment or some other personal advantage. Give what weight you see fit to that.

You should never convict the defendant upon the unsupported testimony of an alleged accomplice unless you believe the unsupported testimony beyond a reasonable doubt. Here the Government contends that Mr. DuBois' testimony finds support in the taped conversation of Mr. Albanese in which he expressed concern about the money that he was owed for the four eighths of a kilo that was received by the Government agents from Battiloro and Goronsky and for which no payment had been made, and he discussed with Mr. DuBois ways in which to satisfy the higher-ups in the heroin trade by making some partial payment and satisfying the balance of the debt from profits on further heroin trading.

One other factor with respect to Mr. DuBois: testimony of a witness can be discredited or impeached by showing that he has been convicted of a felony. This is a circumstance which you may consider, but it is your province to determine

Charge of the Court

the weight to be given to any prior conviction as affecting the credibility of statements made on the witness stand.

A word about reputation evidence. Where a defendant has offered evidence of good general reputation for truth and honesty, a jury may consider that evidence along with all the other evidence in the case. Evidence of a defendant's reputation inconsistent with those traits of character that are ordinarily involved in the commission of a crime charged may give rise to a reasonable doubt, since a jury may think it improbable that a person of good character with respect to those traits would commit such a crime. Although this is described as character evidence, it's really just reputation evidence. A man's actual character may or may not be accurately reflected by his reputation and his acts. That's only known to him. You're to determine the weight to give the reputation evidence.

There's a lot of discussion been given to tapes. I tell you as a matter of law the use of tape recording devices in order to provide a contemporaneous record of a conversation is a permissible method of investigation in cases where one

Charge of the Court.

1
2 party to the conversation has agreed to the recording.
3 The law is that somebody who is engaged in illegal
4 activity takes the risk that his conversations will
5 be reported or recorded by the persons with whom
6 he talks.

7 Finally, on evaluation, I'll mention you're
8 not to decide the case or any issue on the basis
9 of the number of witnesses or number of exhibits.
10 Your decision depends upon the quality of the tes-
11 timony and the credibility of the witnesses and
12 not the number of witnesses or the length of their
13 testimony. The fact that the Governme. had more
14 testimony than the defendant, that's not in itself
15 a decisive matter.

16 I mentioned at the outset, and I repeat now:
17 You should not be influenced by the fact there were
18 objections to some questions or some items of evi-
19 dence that I sustained. You're not to guess what
20 the answer would have been to a question that was
21 ruled out, and you're to disregard any evidence
22 that I struck out, and consider the case only on
23 the testimony and exhibits that I admitted into
24 evidence and the stipulations of the parties which
25 were placed in the record and which have the effect

Charge of the Court

of evidence.

A federal judge has a right to comment on the evidence, to marshal it. I'm not going to duplicate what counsel has done. I'm just going to cover a few points. In reviewing the evidence you should consider the case as a whole, not just individual parts. Mr. DuBois' testimony standing alone certainly has some weaknesses; even apart from his uncertainty about details of price and the order in which specific packages were delivered to him. It's for you to determine whether he was sure that the defendant gave him packages last April and May which he said contained heroin. Even if Mr. DuBois wasn't sure about the price or the days, you should consider the DuBois testimony in connection with the taped conversation of June 3rd, 1974, to see how far it's confirmed or strengthened by the statements that are attributed to Mr. Albanese in that conversation, and that it applied to particular individuals who ultimately distributed the heroin and dates and times mentioned by the agents in connection with the undercover sales.

You can determine if there is in your mind any reasonable doubt that the defendant was really

Charge of the Court

1
2 the one whose voice and words are on the tape; if
3 they are not his, they don't count against him.

4 Mr. DuBois is a professional jewel thief.
5 You can consider that in connection with his testi-
6 mony. Mr. Albanese is a hard-working butcher.
7 Another factor to consider is that Mr. DuBois
8 apparently was a good enough friend of the defendant
9 so that Mr. Albanese, if we believe the surveilling
10 agents, went into Billy's Bar and spent an hour
11 with him.

12 In considering the tapes, there were some
13 remarks on there that might be prejudicial. Bear
14 in mind the defendant is not on trial for anything
15 except the charges in the indictment. Anything on
16 the tapes is significant only to the extent it may
17 indicate whether Mr. Albanese had a part in the
18 conspiracy to distribute heroin and to possess
19 heroin for the purpose of distributing it and
20 whether he in fact turned over or delivered heroin
21 on the dates in April and May to Mr. DuBois.

22 In evaluating the evidence, you should also
23 keep in mind the difference between the conspiracy
24 count and the substantive counts. Count 1, the
25 conspiracy count, needs proof of two or more people

Charge of the Court

1
2 knowingly agreeing to distribute or possess heroin
3 but it doesn't require any showing that the heroin
4 was actually delivered to any particular defendant.

5 Counts 2 and 3 relate to specific sales, one
6 on April 29, 1974, and one on May 8, 1974. If the
7 defendant actually delivered heroin to Mr. DuBois
8 that's a distribution, quite apart from the later
9 delivery by Mr. DuBois to Battiloro or Goronsky.
10 On those, Mr. Albanese would be an aider and
11 abettor.

12 Mr. Rosenkrantz pointed out it is possible
13 the heroin which Battiloro and Goronsky sold to
14 Agent Alleva was something that they got from another
15 heroin dealer or that the packages that were
16 analyzed by the chemists were not in fact the
17 packages that Mr. Albanese delivered to Mr. DuBois.
18 You can determine from the evidence whether this
19 leaves you with any reasonable doubt that the heroin
20 that was purchased by the agent did in fact come
21 from Mr. Albanese.

22 In other words, it's possible to find the
23 defendant guilty of conspiracy beyond a reasonable
24 doubt and not guilty beyond a reasonable doubt of
25 Count 2 or Count 3. That's for your determination.

Charge of the Court

1 You were asked to consider whether Mr.
2
3 DuBois would testify against someone he's afraid
4 of. I should let you know that federal law has
5 provisions that permit United States marshals
6 to protect witnesses who are in danger. There's
7 no guarantee that the protection will be one
8 hundred percent effective, but there's no
9 evidence in the case that Mr. DuBois was afraid
10 of anyone except for the remarks on the tape.
11 You can consider the Government's right to
12 protect the witness in determining what
13 weight to give to the arguments that Mr. DuBois
14 wouldn't testify against someone he feared.

15 What I have said in connection with the
16 evidence or any other part of the charge is not
17 to be taken as an expression of opinion on the
18 guilt or innocence of the defendant.

19 It doesn't mean what I have mentioned is
20 the only significant evidence. You must consider
21 everything as you have in your mind.

22 You're the judges of the facts. Nothing
23 that counsel said or I said prevents you from
24 making your own determination of the facts
25 on your own recollection of the evidence

Charge of the Court

1
2 and applying to those facts the law as I have set
3 it forth.

4 Now a few words about reaching a verdict.
5 Your verdict must be unanimous on each count. That
6 means that you all have to agree. It's a good
7 idea to discuss the evidence rather fully before
8 you take even a tentative vote, so that no one
9 will jump to a hasty conclusion before weighing
10 the entire case. Again, your recollection of the
11 evidence governs, not what I have said or what coun-
12 sel has said. If you're in disagreement and you
13 want some of the testimony repeated, you make the
14 request and I'll call you into court and have the
15 reporter read those portions that you want to hear.
16 You may be kept waiting for a while because it
17 takes some time to find the reporter who took it
18 and to locate the portions of the notes that you
19 ask for.

20 When you go back to the jury room this trip,
21 Juror No. 1 will act as your foreman, preside over
22 your deliberations. Two things she should do:
23 make sure that everybody has a chance to talk, and
24 generally not more than one person talks at a time.

25 During your deliberations you should all

Charge of the Court

1
2 assume the attitude of judges of the fact, not
3 partisans or advocates. In that way you're making
4 a high contribution to the administration of
5 justice.

6 You must report a verdict on all three
7 counts. You can find the defendant guilty on all
8 counts or any one or two of them, not guilty on
9 all counts or on any one or two of them.

10 When you have reached a verdict, Miss Tripp
11 simply gives the marshal a note saying you have
12 reached a verdict. Then when you're back in the
13 courtroom she will report the verdict orally and
14 either party has the right to have the jury polled,
15 which means to ask each juror whether the verdict
16 is in fact his or her verdict, so we know it's
17 unanimous.

18 I repeat, with respect to the punishment,
19 in determining guilt or innocence, you should not
20 give any consideration to the matter of punishment.
21 for this is exclusively the responsibility of the
22 judge if the defendant is found guilty.

23 There will be a marshal available outside
24 the jury room to let the Court know if there are
25 any questions you want to have answered or report

Charge of the Court

1 when you have reached a verdict.

2
3 You're each entitled to your own opinion, but
4 you should exchange views with your fellow jurors
5 and listen carefully to each other. You needn't
6 hesitate to change your opinion if you're convinced
7 what you thought at the beginning is not right,
8 but your final decision must be your own.

9 As I said before, you can determine how
10 long to sit. Normally I say if you haven't reached
11 a verdict by five-thirty, I'll excuse you. Tonight
12 is Friday and tomorrow is Saturday and it's a long
13 week-end, but we don't keep people unduly late here
14 in order to force them to reach a verdict.

15 I'm at the anticlimax of my instructions
16 now, because the law provides that after a judge
17 has instructed the jury, counsel may call attention
18 to anything on which he has misspoken or left out.
19 When you're back in the jury room, I'll give them
20 an opportunity to do that.

21 I'll give the final paragraph now, in case
22 I don't have to bring you out again. Remember when
23 you go into the jury room, your oaths sum up your
24 duty, that is, without fear or favor to any man,
25 you will well and truly try the issues between the

Charge of the Court

parties according to the evidence heard by you in court and the law of the United States.

Now we'll swear in the marshal.

(Marshal Robert Leschorn was sworn.)

THE COURT: We'll let Mr. Renree go into the jury room to get his things, and he will report downstairs. You'll be excused after that.

The marshal can take the jury into the jury room. Go right ahead.

Mr. Renree, don't talk to anybody while you're getting your things.

(The jury leaves the courtroom.)

THE COURT: Any exceptions?

MR. WEINTRAUB: No, sir.

THE COURT: Mr. Rosenkrantz?

MR. ROSENKRANTZ: I would specifically except to your Honor's charge in which your Honor indicated to the jury that it was my argument that Mr. Albanese may have delivered heroin to Mr. DuBois but that this was not the same heroin that Battiloro and Goronsky were alleged to have received. I did not make that argument before the jury. I made that argument--- That was a legal argument presented to the Court out of the presence of the jury, and I

1 at no time conceded to the jury.

2 THE COURT: Go ahead.

3 MR. ROSENKRANTZ: He's shaking his head.

4 I at no time indicated to the jury that or conceded
5 to the jury that he had passed heroin to Mr. DuBois.

6 THE COURT: I thought what I said was
7 somewhat favorable, indicating it might be what
8 the chemist analyzed was not what he gave to them.

9 MR. ROSENKRANTZ: I wish you would make
10 clear to the jury I do not concede he passed heroin
11 or knowingly passed heroin to Mr. DuBois.

12 THE COURT: I thought that was obvious, but--
13 let me see what I said.

14 No, I said-- Maybe I was wrong in saying
15 you had pointed out, but the packages analyzed by
16 the chemist were not the packages delivered to
17 Mr. DuBois. You don't concede that anything was
18 delivered to him.

19 MR. ROSENKRANTZ: That's correct.

20 THE COURT: Let me get them in to tell
21 them that.

22 MR. WEINTRAUB: Anything else?

23 THE COURT: Anything else?

24 MR. ROSENKRANTZ: I would specifically except
25 to your Honor's indicating that at one point your

1 Honor indicated the testimony of Mr. DuBois can be
2 corroborated by the tapes of his conversations with
3 Mr. Albanese, because of course I do not concede
4 he had any conversations with Mr. Albanese.

5 THE COURT: I said they're to determine
6 whether in fact it was Mr. Albanese's voice on
7 there. I'll leave it that way.

8 MR. ROSENKRANTZ: Thank you, your Honor.

9 THE COURT: Bring them back.

10 (Jury enters the jury box.)

11 THE COURT: I have just one thing to add.
12 I spoke about the possible defense that the packages
13 analyzed by the chemist were not the packages
14 delivered to Mr. DuBois. The defendant does not
15 concede that any packages were delivered to Mr.
16 DuBois by Mr. Albanese. That's for you to determine
17 on the basis of all the evidence in the case.

18 Otherwise, the charge stands as it is.
19 If you have any questions, you can give a note to
20 the marshal. Thank you.

21 (The jury leaves the courtroom.)

22 THE COURT: I would suggest you people stay
23 around. If the jury asks questions, they frequently
24 come early.

25 MR. ROSENKRANTZ: Yes, your Honor.

1

THE COURT: I will be in chambers.

2

3

If you go downstairs, Mr. Weintraub, be
where you can be reached by phone.

4

5

MR. WEINTRAUB: Yes.

6

(Time noted: 2:00 p.m.)

7

8

(Time noted: 3:45 p.m.)

9

10

THE COURT: I have a note saying the jury
has reached a verdict. We'll bring them in. The
Clerk can mark it.

11

12

THE CLERK: Jury note marked Court Exhibit 1.

13

(So marked)

14

(The jury enters the jury box.)

15

16

THE COURT: Miss Tripp, I have your note
saying you have reached a verdict. Will you tell
me what the verdict is.

17

18

THE FOREMAN: We reached a verdict of
guilty on all three counts.

19

20

THE COURT: You may be seated.

21

Do you want the jury polled, Mr. Rosenkrantz?

22

MR. ROSENKRANTZ: Yes.

23

THE COURT: Will you do that.

24

THE CLERK: Yes, your Honor.

25

Ladies and gentlemen of the jury, as the

1 Court has received your verdict, you say you find
2 the defendant guilty on Count 1, guilty on count
3 2, and guilty on Count 3.

4 Madam Forelady, is that your verdict?

5 JUROR NO. 1: Yes.

6 THE CLERK: Juror No. 2, is that your verdict?

7 JUROR NO. 2: Yes.

8 THE CLERK: Juror No. 3, is that your verdict?

9 JUROR NO. 3: Yes.

10 THE CLERK: Juror No. 4, is that your verdict?

11 JUROR NO. 4: Yes.

12 THE CLERK: Juror No. 5, is that your verdict?

13 JUROR NO. 5: Yes.

14 THE CLERK: Juror No. 6, is that your verdict?

15 JUROR NO. 6: Yes.

16 THE CLERK: Juror No. 7, is that your verdict?

17 JUROR NO. 7: Yes.

18 THE CLERK: Juror No. 8, is that your verdict?

19 JUROR NO. 8: Yes.

20 THE CLERK: Juror No. 9, is that your verdict?

21 JUROR NO. 9: Yes.

22 THE CLERK: Juror No. 10, is that your ver-

23 dict?

24 JUROR NO. 10: Yes.

25 THE CLERK: Juror No. 11, is that your verdict?

1 JUROR NO. 11: Yes.

2 THE CLERK: Juror No. 12, is that your
3 verdict?

4 JUROR NO. 12: Yes.

5 THE CLERK: Jury polled, your Honor.

6 THE COURT: Thank you, ladies and gentlemen.
7 You reached what I think is probably the only ver-
8 dict that is proper on the evidence. The defendant
9 has had good counsel and vigorous defense. You have
10 seen the extent of work necessary.

11 I might mention that Mr. Battiloro and Mr.
12 Goronsky were brought to trial a couple of weeks ago
13 and they pleaded guilty. Mr. Albanese was not tried
14 at the time because the tapes that were used against
15 him would have been incriminating against the other
16 two defendants, and if they had been used against
17 the other two defendants, it would have been con-
18 sidered improper, having been said out of their
19 presence, and Mr. DuBois, of course, has pleaded guilty.
20 He is under protective custody and I'll have to
21 determine what to do on sentencing him.

22 The reason why the indictment was in December,
23 although the offense was in May, is that this is the
24 third indictment. The first one was just against
25 the three, Battiloro, DuBois, and Gregoris. Then when

1 Mr. DuBois cooperated and named Mr. Albanese there
2 was another indictment against Albanese, and then
3 when the name of "El D" was discovered,
4 there was a third superseding indictment in December
5 which named that individual. That's also one reason
6 why we have been somewhat longer than we try to be
7 in the state courts, although the defendant is not
8 in custody and given six months within which to
9 try him.

10 I won't say anything more because you're
11 going to be serving here a couple of more weeks.
12 I don't know what other cases you'll be in.

13 Thank you for your patience and your attention.
14 You're excused until Monday morning. Then report
15 downstairs.

16 (Jury leaves the courtroom.)

17 THE COURT: Mr. Weintraub, should the
18 defendant be remanded or should he remain on bail?

19 MR. WEINTRAUB: (No response)

20 THE COURT: I would think the guilt was
21 quite clear here and there is not much purpose in
22 continuing him at large.

23 MR. ROSENKRANTZ: Your Honor, I believe the
24 bail of the other two defendants who had prior
25 criminal records was continued after their plea of

1 guilty. This defendant did go to trial, but he did
2 not testify on his own behalf. There were some
3 legal aspects of the defense. He has no prior
4 criminal record, always appeared. In fact, his
5 surety is present in court, his sister. I don't
6 think there is any risk of his not appearing. He
7 always appeared at all other times knowing the
8 strength of the case of the Government, which we
9 knew about long before trial. There was no
10 attempt to evade the prosecution.

11 He does have a family and personal affairs
12 that he would like to make some provision for. I
13 would ask the Court to continue his bail. I had
14 spoken to the prosecutor about this and I don't
15 think there is any objection to continuing bail at
16 this time.

17 MR. WEINTRAUB: I had had thoughts of con-
18 tinuing Mr. Albanese on bail. There are two things
19 that bother me. One is the fact that he is in a
20 different posture, being convicted. The other is
21 he is now working as I understand, as a manager
22 of Bill's Bar. The Government does have indica-
23 tion that Mr. Gregoris, who is a fugitive, may
24 have an interest in Bill's Bar, the same place
25 we discussed during the case. I therefore would

1 have serious thoughts about whether Mr. Albanese
2 is in touch with Mr. Gregoris and might well seek
3 the same refuge that Mr. Gregoris has sought here.

4 MR. ROSENKRANTZ: As I say, there has never
5 been any indication of that. If it was going to
6 take place or an attempt along those lines were
7 to be made, it would be made before trial--

8 THE COURT: It might not have been. He might
9 think there's always uncertainty what a jury will do.

10 MR. ROSENKRANTZ: I don't think that's a
11 serious contention in this case. I did advise him
12 of the strength of the Government's case. He was
13 aware of it. Certainly the age of the main witness
14 against him might have been an inducement for him,
15 if he had that type of inclination, but because of
16 his family's property, money that's put up as col-
17 lateral, I do not believe that he would flee, and
18 I don't believe there's any proof of any sort that
19 he has been in touch with Mr. Gregoris.

20 THE COURT: That would be very hard to prove.

21 MR. ROSENKRANTZ: I know they have had
22 agents in Bill's on numerous occasions. He has
23 been there regularly. He does have a family to
24 think of. He's not a man without roots in the
25 community. He does have two young children. He

1 wants to make some provision for them.

2 THE COURT: Do you think Mr. DuBois is reason-
3 ably secure?

4 MR. WEINTRAUB: Mr. DuBois is reasonably
5 secure. That is not the problem.

6 THE COURT: That's one of the things I had
7 in mind.

8 MR. WEINTRAUB: He's relocated out of New York.

9 THE COURT: It seemed to me Mr. Albanese
10 might be more of a risk to other people than Bat-
11 tiloro or Coronsky.

12 MR. ROSENKRANTZ: I believe a lot of those
13 things were said in the heat of the moment. There
14 has never been any indication he ever possessed
15 a weapon. In fact, when he was arrested, he was
16 arrested at a time when he would not know there
17 was an indictment out for him, they didn't find
18 a gun on him or in the car.

19 MR. WEINTRAUB: That is not correct. He
20 was in possession of a gun when arrested. He has
21 a permit.

22 MR. ROSENKRANTZ: What kind of gun?

23 THE DEFENDANT: I had a permit.

24 MR. ROSENKRANTZ: It was never brought up.
25 In any event, he would surrender that. He has

4

1 always appeared and I thought--

2 MR. WEINTRAUB: Does he still have that gun?

3 THE DEFENDANT: No, of course not.

4 MR. WEINTRAUB: It's a federal violation
5 to be in possession of a firearm that's moving in
6 interstate commerce if you're a convicted felon
7 at this point.

8 THE COURT: You're not convicted until
9 the sentence.

10 MR. WEINTRAUB: I stand corrected.

11 THE DEFENDANT: I surrendered that.

12 THE COURT: I think I'll leave him at large
13 temporarily, but I think I have heard enough about
14 his background so that I can sentence at least for
15 purposes of appeal without a presentence report,
16 and I'll put it down for sentence on April 4.
17 I think he should be prepared to begin serving his
18 sentence then.

19 MR. ROSENKRANTZ: Would your Honor give him
20 at least--that's only about a week and a half.

21 THE COURT: Two weeks.

22 MR. ROSENKRANTZ: He has two children that
23 he has to make some arrangements for.

24 MR. WEINTRAUB: Considering that Mr. Rosen-
25 krantz informed Mr. Albanese before this of the

1 strength of the government's case, I would expect
2 he would have been preparing before this, and two
3 weeks should be more than ample time--

4 THE COURT: It's more than ample. Two weeks
5 is adequate. I'm going to put it down for sentence
6 on April 4.

7 MR. WEINTRAUB: Could we set it down for 9:30?
8 I have to begin a trial before Judge Platt.

9 THE COURT: 9:30 on April 4. I think I have
10 a right and under Rule 32(c)(1) to direct that the
11 sentence be without a presentence report, but he
12 should report to Probation so that a report can
13 be prepared for consideration by a panel on a
14 motion to reduce in the event of an affirmance.

15 MR. WEINTRAUB: Thank you, your Honor.

16 You did all you could with the facts,
17 Mr. Rosenkrantz.

18 MR. ROSENKRANTZ: Thank you.

19 THE COURT: I thought Mr. Weintraub made it
20 a little close in getting more corroborative evi-
21 dence. Never put a witness on the stand unless you
22 need to.

23 MR. WEINTRAUB: We always have a few towards
24 Mr. Gregoris' possibly being called, your Honor.

25 MR. ROSENKRANTZ: I move at this time to

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2 set aside the judgment and conviction on all three
3 counts as being against the law and the weight of
4 the evidence.

5 THE COURT: You have a right to make the mo-
6 tion, but unless I made some error that the courts
7 find, I think the verdict is proper and I'll deny
8 the motion.

9 (Time noted: 3:45 p.m.)
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